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8                   UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA  
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10 DAVID BAUMGARDNER, an individual;  
11 GIMME FIVE D, LLC, a Washington State  
limited liability company; and  
12 COMMENCEMENT VIEW, LLC, a  
Washington State limited liability company,

13                   Plaintiffs,

14                   v.

15 TOWN OF RUSTON, a fourth class  
16 municipal corporation; MICHAEL  
TRANSUE, individually and in his former  
17 official capacity as Ruston Mayor; HUITT-  
ZOLLARS, INC., a Texas corporation, and  
18 CARL STIXROOD, individually and in his  
official capacity as Ruston Town Planner,

19                   Defendants.

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21                   CASE NO. C09-5151RJB

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23                   **ORDER ON CROSS MOTIONS  
FOR SUMMARY JUDGMENT**

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25                   This matter comes before the Court on Defendants Town of Ruston and Michael  
Transue's Motion for Summary Judgment Re: Federal Claims (Dkt. 64), Plaintiffs' Motion for  
26 Partial Summary Judgment (Dkt. 63), Defendants Huitt-Zollars and Carl Stixrood's Motion for  
Summary Judgment (Dkt. 57), Defendants Town of Ruston and Michael Transue's Motion for  
27 Summary Judgment Re: State Claims (Dkt. 65), Defendants Huitt-Zollars and Carl Stixrood's  
Joinder in Ruston and Transue's Motion for Summary Judgment (Dkts. 78 and 79), Plaintiffs'  
Motion to Strike Defendants Huitt-Zollars and Carl Stixrood's Editorial Exhibits 1 and A-C

1 (Dkt. 106), and Defendant Ruston and Transue's motion to strike (Dkt. 95). The Court has  
2 considered the pleadings filed in support of and in opposition to the motions and the file herein.

3 **I. FACTUAL AND PROCEDURAL BACKGROUND**

4 **A. FACTS**

5 This matter centers around undeveloped property located at 5000 North Orchard Street in  
6 Ruston, Washington. Dkt. 1. The property is on the west side of North Orchard Street, and so, is  
7 in Ruston. Dkt. 74, at 2. North Orchard Street is bordered on the east by Tacoma, Washington.  
8 Dkt. 67, at 2. It is an eighteen foot wide paved roadway with curbs and gutters on the Ruston  
9 side, but not on the Tacoma side. Dkt. 67, at 2. The whole of North Orchard Street in the  
10 subject area is controlled by Ruston. *Id.* There is no storm water catchment system for North  
11 Orchard. *Id.*

12 **1. Plaintiffs and Plaintiffs' Tacoma Property on North Orchard Street**

13 Plaintiff David Baumgardner is a real estate developer. Dkt. 1, at 5. He is the managing  
14 member of the two Washington limited liability companies - Gimme Five D, LLC and  
15 Commencement View, LLC - that are named as Plaintiffs in this case. *Id.* In 2005,  
16 Commencement View, LLC, purchased 10 acres of land on the Tacoma side of North Orchard  
17 Street. Dkt. 68, at 3. The property was on a "bluff and down along the railroad tracks on Ruston  
18 Way," and "is part of the ASARCO 'Super Fund' EPA jurisdiction." Dkt. 68, at 4. Three view  
19 lots were developed on top of the Tacoma side of the bluff. Dkt. 68, at 4. Plaintiffs eventually  
20 purchased the subject property which is on the Ruston side of North Orchard Street. Dkt. 77-4,  
21 at 5. In order to get utilities to Plaintiffs' North Orchard properties (those both within Ruston  
22 and Tacoma city limits), Plaintiffs need to get a permit from Ruston. Dkt. 58-4, at 28.

23 **2. Ruston**

24 Ruston has a total population of 750 people and occupies about 5 blocks. Dkts. 69, at 2;  
25 73, at 3. The mayor is Ruston's land use official. Dkt. 73, at 3. None of the few people that  
26 work for Ruston have any land use experience. Dkt. 69, at 2. In 1995, Ruston contracted with  
27 Richard Carothers & Associates ("Carothers") for land use planning related services. Dkt. 69, at  
28

1       2. Defendant Carl Stixrood worked for Carothers when the contract was awarded, and was  
2 involved in the bidding and selection process. Dkt. 77-2, at 5-7. The contract, referred to as  
3 “Consulting Agreement,” provided that Carothers, referred to as the “consultant,” would perform  
4 “planning, civil engineering, landscape architecture, and surveying services in connection with  
5 the general and specific projects by written task order.” Dkt. 66-4, at 2. The consultant was to  
6 “perform all services and provide all work product . . . within the time limit shown on the  
7 specific task order from the date written notice is given to proceed, unless an extension of such  
8 time is granted in writing.” Dkt. 66-4, at 5. Payment was not to exceed “the amount provided on  
9 each specific task order.” Dkt. 66-4, at 2. The consultant was to secure a general liability  
10 insurance policy, and name Ruston as an insured. Dkt. 66-4, at 3. The consultant was to  
11 “perform its obligations with a high degree of professional skill and diligence.” Dkt. 66-4, at 3.  
12 The contract provides for attorneys fees and costs to a prevailing party who prevails in a suit  
13 against the other for enforcement of the contract. Dkt. 66-4, at 4.

14           Ruston charges fees for land use application review pursuant to RCW 82.02.020. Dkt.  
15 69, at 2. The Ruston Municipal Code provides that Ruston’s fees are \$150.00 plus consultant  
16 and staff costs over one hour. Ruston Municipal Code (“RMC”) 1.14.050, in the record at Dkt.  
17 58-4, at 39-37. According to former Ruston Mayor Kim Wheeler, developers have no  
18 administrative remedies to challenge fees charged. Dkt. 73, at 9-10.

19           In 1998, Carothers merged with Defendant Huitt-Zollars, Inc. (“HZ”). Dkt. 69, at 2.  
20 According to both HZ and Defendant former Ruston Mayor Michael Transue, who was in office  
21 from 1997-2002 and from 2006-2008, HZ assumed Carother’s responsibilities under the  
22 Consulting Agreement. Dkts. 59, at 2; 58-4, at 6-7; 58-4, at 59-60. Mr. Stixrood was the land  
23 use planner, employed first by Carothers and then by HZ, to review land use applications for  
24 Ruston. Dkt. 59, at 2. He testified that he was not free to rewrite regulations or make proposals  
25 to the mayor or council. Dkt. 58-4, at 4. He testified that he and the other HZ staff members  
26 would perform town planning services on an “on-call” or “as directed” basis, but did not come  
27 up with projects like a traditional town planner would. Dkt. 58-4, at 4-5. Mr. Stixrood testified  
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1 that he did most of the work for Ruston. Dkt. 58-4, at 6. As Mayor, Defendant Transue testified  
 2 that he did not feel that Mr. Stixrood was an employee of Ruston, but just a consultant. Dkt. 48-  
 3 4, at 49.

4 Mr. Stixrood testified, that in practice, some of the town-initiated projects used task  
 5 orders, but they were not used for developer's applications. Dkt. 77-2, at 7. Mr. Stixrood  
 6 testified that he believed the rates that HZ charged were in line with the industry standard. Dkt.  
 7 77-2, at 9-11. He stated that he would record his time as he was doing the work, and put it in a  
 8 timesheet at the end of the week. Dkt. 66-37, at 19.

9 Kevin Foley, Plaintiffs' engineer, stated that he had attended several meetings and Mr.  
 10 Stixrood did not do a good job of controlling the Town Council meetings or the Planning  
 11 Commission meetings. Dkt. 58-4, at 28-30. Mr. Foley observed that Mr. Stixrood did not try to  
 12 bring the members back to what they were supposed to be talking about. Dkt. 58-4, at 28-30.

13 Mr. Stixrood states that HZ billed Ruston for its services monthly. Dkt. 59, at 2.  
 14 Ruston's Town Council approved the bills, and the Town Clerk paid HZ's bills monthly. Dkts.  
 15 58-4, at 53 and 97, at 4. Ruston generally did not bill an applicant until the review process was  
 16 complete. Dkt. 59, at 2.

17       3.     Subject Property - Ruston Side of North Orchard Street

18 In April of 2005, Joellen Lewtas Jungers, one of the then owners of the subject property,  
 19 contacted Mr. Stixrood. Dkt. 59, at 2. Mr. Stixrood states that he advised her about the process  
 20 and possible fees associated with vacating a portion of Court Street, which abutted the subject  
 21 property. Dkt. 59, at 2. He estimated that the cost to have Court Street vacated would be around  
 22 \$2,000 to \$4,000. Dkt. 59-2, at 13.

23 On June 3, 2005, Mr. Stixrood recommended to the Ruston Town Council that a portion  
 24 of Court Street be vacated, and that a cul-de sac, at the end of Court Street for emergency vehicle  
 25 turn around, was "desirable." Dkt. 59-2, at 21. The Town Council decided a study session was  
 26 needed, and directed Mr. Stixrood to examine alternative methods of accommodating an  
 27 emergency vehicle turnaround. Dkt. 59-3, at 2. Mr. Stixrood testified that he drafted different

1 possible lot configurations (assuming that every piece of ground that could be developed would  
 2 be developed and nothing else would hinder development), and possible emergency vehicle  
 3 accesses. Dkt. 58-4, at 14. He drafted “A Supplemental Staff Report,” reviewed several options,  
 4 and recommended that a “fire access loop road” was the best option to provide emergency  
 5 vehicle access. Dkt. 59-3, at 5-11. He then drafted the Town of Ruston Ordinance 1172, which  
 6 vacated the contemplated portion of Court Street subject to the condition that a loop turnaround  
 7 be built. Dkts. 59, at 3; 59-3, at 12-14. Ordinance 1172 was signed by the Mayor of Ruston in  
 8 July of 2005. Dkt. 59-3, at 12-14.

9           In September of 2005, Mr. Baumgardner made offered \$850,000 for the North Orchard  
 10 Street Ruston property, contingent on a feasibility study on whether the property could be  
 11 developed. Dkt. 58-2, at 27. Originally, Mr. Baumgardner and the sellers contemplated  
 12 November 26, 2005, as the deadline for Mr. Baumgardner’s feasibility review. Dkt. 58-2, at 8.  
 13 This deadline was extended to December 23, 2005, and again to January 17, 2006. Dkt. 58-2, at  
 14 9-10. Before he bought the Ruston property, the prior owners gave Mr. Baumgardner the  
 15 drawings Mr. Stixrood did for Ordinance 1172, which indicated that nine to twelve lots could be  
 16 developed on the subject property. Dkt. 68, at 5.

17           On December 30, 2005, Mr. Baumgardner contacted Mr. Stixrood regarding the subject  
 18 property and inquired about substituting a cul-de-sac for the loop turnaround required in  
 19 Ordinance 1172. Dkt. 59, at 3. Mr. Baumgardner testified that Ruston’s Town Clerk, Karen  
 20 Murphy, had referred him to Mr. Stixrood. Dkt. 58-3, at 33. Mr. Baumgardner asserts in his  
 21 declaration that Mr. Stixrood told him that “nine to twelve lots could be built and that the  
 22 building height restrictions were 30 feet measured from a location that accommodated the steep  
 23 slope of the property.” Dkt. 68, at 5. He states that “these characteristics made the property  
 24 attractive to [him] as a developer as the more lots that can be developed the higher the potential  
 25 returns.” Dkt. 68, at 5. During his deposition, Mr. Baumgardner testified that he and Mr.  
 26 Stixrood also discussed a six or seven lot “possibility.” Dkt. 58-3, at 11.

27           Mr. Baumgardner testified that in January of 2006, he had a conversation with Penelope  
 28

1 St. John, at HZ, regarding the number of lots possible on the property. Dkt. 58-3, at 14. Mr.  
2 Baumgardner testified that she referred him to some of the exhibits which were attached to  
3 Ordinance 1172, which included several different possible lot configurations, including a  
4 possible five lots, six lots, eight lots or maybe nine lots on the subject property. Dkt. 58-3, at 15-  
5 16. He states that he explored a six lot possibility with her. Dkt. 58-3, at 17. On January 10,  
6 2006, after that conversation, Mr. Baumgardner sent an email to his real estate agent, stating that  
7 he was looking at a three to four lot configuration. Dkt. 58-2, at 11-12, and 36. He testified  
8 during his deposition that this email was sent during the negotiation process, and that he was  
9 “assuming the worst and hoping for the best.” Dkt. 58-3, at 20. He states that he was relying, in  
10 part, on what Baseline Engineering, his engineering firm, was telling him. Dkt. 58-3, at 27. Mr.  
11 Kevin Foley, of Baseline Engineering, testified that he and Mr. Baumgardner worked on a four  
12 lot plan, because the other configurations just did not work. Dkt. 58-4, at 25-26.

13 In March of 2006, Mr. Stixrood informed Mr. Baumgardner that the mayor had directed  
14 HZ not to continue work on questions regarding the subject property until Mr. Baumgardner  
15 signed an agreement to pay for services. Dkt. 58-3, at 53.

16 On April 11, 2006, Mr. Baumgardner signed an “Agreement to Pay for Town Review  
17 Services.” Dkt. 59-3, at 22. This document provides that, “[b]y requesting this action, the  
18 applicant agrees to pay the full cost of review regardless of outcome.” Dkt. 59-3, at 22. The  
19 Agreement lists the scope of services to include: “preliminary review per RMC 29.02 and RCW  
20 58-17.110 in anticipation of submittal for short plat review and final short plat approval. This  
21 includes review of the proposed cul-de-sac as submitted on 01/09/06 to determine if the solution  
22 is feasible.” Dkt. 59-3, at 22. HZ estimated the labor and materials cost to be \$800.00 but  
23 cautioned that “the balance due will reflect the actual amount spent.” Dkt. 59-3, at 22.

24 On April 13, 2006, Mr. Baumgardner was informed by Mr. Stixrood that Mr. Stixrood’s  
25 interpretation of height calculations on steep slopes was incorrect. Dkt. 59-3, at 27. Mr.  
26 Stixrood testified that the Town Council changed the Code in December of 2005, and it became  
27 effective in February of 2006. Dkt. 66-37, at 27. Mr. Baumgardner notes that Mr. Stixrood  
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1 helped draft the change in the code regarding building heights. Dkt. 68, at 9. Mr. Stixrood  
2 stated that he sent Mr. Baumgardner an email to let him know of the change, because they had  
3 conversation in 2005 regarding the previous interpretation of the prior code. Dkt. 66-37, at 27.

4       Concerned that the first contract may have expired, Mr. Baumgardner and the prior  
5 owners renegotiated the deal for the Ruston property on April 24, 2006, and dropped the  
6 purchase price to \$827,500.00. Dkt. 58-2, at 41. The deal did not close for several months. Dkt.  
7 77-4, at 5.

8           Michael Robinson, Plaintiffs' real estate agent, testified that he had a conversation in  
9 April of 2006 with Mr. Baumgardner about Mr. Stixrood's drawings which were submitted with  
10 Ordinance 1172. Dkt. 77-2, at 40. Mr. Robinson testified that Mr. Baumgardner told him that  
11 the vacation of Court Street was done without "topo or geo" and that "Stixrood has lots off hill."  
12 Dkt. 77-2, at 40. Mr. Robinson further testified Mr. Baumgardner felt that the loop road design,  
13 from Ordinance 1172, could not be utilized. Dkt. 77-2, at 40.

14           Kevin Foley, of Baseline Engineering, testified that in June of 2006, he and Mr.  
15 Baumgardner had settled on a hammerhead turnaround for emergency vehicles. Dkt. 77-3, at 31.  
16 He testified that his firm had prepared a conceptual drawing of the hammerhead turnaround  
17 which was submitted to Ruston and HZ before passage of Ordinance 1200, which mandated the  
18 hammerhead turnaround. Dkt. 77-3, at 32.

19           Mr. Stixrood states that by July of 2006, he was discussing three approvals with Mr.  
20 Baumgardner, including the fire turn around, variance from height requirement and lot  
21 segregation approval, rather than the single approval referenced in the April 11, 2006,  
22 "Agreement to Pay for Town Review." Dkt. 59, at 4. On July 19, 2006, in his letter to Mr.  
23 Baumgardner, Mr. Stixrood informed him that the "processing costs for a variance requests are  
24 typically in excess of \$5,000," and that the "costs of segregation review would be charged to the  
25 applicant." Dkt. 59-3, at 28-29. Mr. Baumgardner states that Mr. Stixrood "kept pushing for a  
26 subdivision proposal" which Mr. Baumgardner contends was not necessary because the property  
27 was already platted. Dkt. 68, at 11. Mr. Stixrood contends that he was encouraging this because

1 it was cheaper. Dkt. 92, at 7.

2 On July 26, 2006, HZ sent Mr. Baumgardner a summary of charges as of July 22, 2006,  
3 for \$2,272.14. Dkt. 59-3, at 31. HZ acknowledges that this is more than the original estimate of  
4 \$800.00. Dkt. 59-3, at 31.

5 On July 27, 2006, Plaintiffs filed a petition with Ruston to vacate an alley and all of  
6 Orchard Street to the east of the subject property, and to change the emergency vehicle access  
7 required in Ordinance 1172. Dkt. 74-2, at 9. Mr. Baumgardner states that Mr. Stixrood's loop  
8 turn around emergency vehicle access proposal, in Ordinance 1172, could not be built as drawn.  
9 Dkt. 68, at 6. He states that the loop was drawn off the bluff. Dkt. 68, at 6. Mr. Baumgardner  
10 states that he felt that Ruston would want to fix the problems with Ordinance 1172 that he asserts  
11 Mr. Stixrood created. Dkt. 68, at 7. Mr. Baumgardner states that when he raised the issue with  
12 Mr. Stixrood, he was told to submit a proposal to change the loop turn around. Dkt. 68, at 7.  
13 Plaintiffs submitted a drawing of their proposed hammerhead emergency vehicle turnaround.  
14 Dkt. 74-2, at 13. On December 18, 2006, Town of Ruston Ordinance 1200 was adopted. Dkt.  
15 74-2, at 15-22. Ordinance 1200 vacates the alley and a portion of North Orchard Street  
16 requested by Plaintiffs and requires that they dedicate land for a hammerhead emergency vehicle  
17 turnaround before any application for a grading permit or lot segregation permit could be  
18 approved. Dkt. 74-2, at 15-22. Plaintiffs were also required to dedicate land for an  
19 approximately ten foot public viewing area with guardrails. Dkt. 74-2, at 17 ("The 10' -/+ area  
20 in Orchard Street right-of-way east of the turnaround shall be available for public access.").

21 On July 27, 2006, Plaintiffs filed an application for a variance from the lot grade  
22 definition regarding the calculation of building height. Dkt 74-2, at 36-48. Mr. Baumgardner  
23 states that rather then recommend Ruston amend Ordinance 1178, regarding building height  
24 calculations, Mr. Stixrood recommended that Mr. Baumgardner apply for a variance. Dkt. 68, at  
25 9. Mr. Baumgardner states that he ended up paying nearly \$14,000.00 for a height variance in  
26 "an instance where [Mr. Stixrood] led [him] to believe height was not an issue, and where the  
27 code could not be met without constructing a subterranean home." Dkt. 68, at 10. Mr.

1 Baumgardner states that in addition, his property was then encumbered with restrictions on  
2 pruning trees and shrubs. Dkt. 68, at 10. Plaintiffs' requested variance from the building height  
3 requirements, with conditions addressing protection of vegetation on steep slopes, was approved  
4 on October 16, 2006. Dkts. 74, at 3; 74-3, at 7.

5 The North Orchard Street Ruston property was finally conveyed from Robert H. Jungers,  
6 Joellen Lewtas Jungers, and John Lewtas to Plaintiff Gimmie Five D, LLC, by deed dated  
7 August 30, 2006. Dkt. 77-4, at 5.

8 On January 24, 2007, Ruston sent Mr. Baumgardner a bill for "professional services"  
9 through July 22, 2006, for \$2,272.14, and July 23, 2006 through December 23, 2006, for  
10 "services provided by Huitt Zollars for variance, definition of fire turn around compliance,  
11 ordinance amendment, SEPA review and all public hearings" for \$41,254.61, and  
12 "administrative costs" for \$2,176.33. Dkt. 66-2, at 2. Mr. Baumgardner emailed Mr. Stixrood in  
13 response and stated that the bill exceeded the \$5,000 to \$10,000 he agreed to pay. Dkt. 58-3, at  
14 37. Mr. Baumgardner notes that when he questioned Mr. Stixrood regarding the bills, he was  
15 charged for bill review. Dkt. 68, at 12. Mr. Baumgardner complains that he was billed 34 hours  
16 by HZ for a "fire turn around drawing." Dkt. 68, at 13. He states that he had already submitted a  
17 hammerhead turnaround drawing from his experts, so HZ should not have been preparing any  
18 drawings. Dkt. 68, at 13. Mr. Baumgardner notes that Mr. Stixrood billed for an hour and half  
19 to talk with the fire chief, although the fire chief denies ever speaking with Mr. Stixrood for over  
20 fifteen minutes. Dkt. 68, at 13.

21 Former Mayor Transue states that Mr. Baumgardner complained to him about the bills  
22 generated from HZ' work. Dkt. 97, at 3-4. Transue states that he referred Mr. Baumgardner to  
23 Mr. Stixrood, and also directed the Town Clerk to remove the administrative fee of 5%. Dkt. 97,  
24 at 3-4. Mr. Baumgardner complained to the Town Council about the bills. Dkt. 68, at 13-14.

25 Mr. Stixrood states that while he was involved, Mr. Baumgardner made a total of four  
26 separate town actions. Dkt. 59, at 5. He states that there were a number of council and/or  
27 planning commission meetings related to Mr. Baumgardner's requests. Dkt. 59, at 5.

1       Former Mayor Transue testified that he felt that Mr. Stixrood was doing the work that  
2 Mr. Baumgardner requested. Dkt. 58-4, at 64-64. Mayor Transue acknowledges that he never  
3 did an audit of HZ, or explore whether they were getting a competitive rate with HZ. Dkt. 66-  
4 38, at 11.

5       On October 19, 2007, Plaintiffs filed a request to prune trees on the steep slope to  
6 improve views. Dkt. 74-3, at 19. More information was requested by Mr. Stixrood. Dkt. 74, at  
7 3. Mr. Baumgardner asserts that Mr. Stixrood created “absurd requirements, including his  
8 demands that [he] map out every bush, shrub, and tree on [his] property.” Dkt. 68, at 11. Mr.  
9 Baumgardner states that after HZ’s contract was terminated in 2008, he provided the Town  
10 Council a picture rather than these drawings, and his tree pruning request was approved. Dkt.  
11 68, at 12. Plaintiffs’ request was approved in June of 2009. Dkt. 74-3, at 27.

12       Mr. Foley, Plaintiffs’ engineer, testified that in November 2007, he notified HZ and  
13 Ruston that there were errors in Ordinance 1200 (the ordinance that vacated Court Street and an  
14 alley), soon after he received a copy of Ordinance 1200. Dkt. 77-3, at 36. These errors included  
15 errors in the legal description and errors as to exhibits. Dkt. 66-44, at 2. Baseline Engineering  
16 billed Mr. Baumgardner \$4,441.25 for its work correcting Ruston’s mistakes on Ordinance 1200.  
17 Dkt. 66-44, at 5-6.

18       In November of 2007, Mr. Baumgardner paid almost \$42,000.00 of the January 24, 2007,  
19 bill from Ruston, “under protest.” Dkt. 68, at 13.

20       On December 3, 2007, Carl Stixrood reviewed Plaintiffs’ two lot segregation requests, as  
21 required by Pierce County, Washington. Dkt. 74-3, at 41. Plaintiffs were reminded that their  
22 application was not complete; including their failure to meet requirements in Ordinance 1200 for  
23 the dedication of the emergency vehicle access right of way. Dkt. 74-3, at 42. In 2009, Plaintiffs  
24 signed the deed which dedicated a portion of the property for emergency vehicle access. Dkt.  
25 74-3, at 50. Ruston’s Town Council accepted the deed on June 1, 2009. Dkt. 74-3, at 51. After  
26 Plaintiffs provided a tax affidavit (on June 19, 2009), Ruston filed the deed which dedicated a  
27 portion of the property for emergency vehicle access, on June 22, 2009. Dkt. 74-3, at 50.

1 Ruston approved the lot segregation on June 24, 2009. Dkt 74-3, at 25.

2 Defendant Stixrood also responded to Plaintiffs' October 2007 grading permit application  
3 on December 3, 2007. Dkt. 74-3, at 58. He again reminded Plaintiffs that the application was  
4 incomplete absent the dedication of the emergency vehicle turn around and that they had  
5 submitted an incomplete grading plan. Dkt. 74-3, at 58. The first requirement - the deed  
6 granting the property for the turn around - was fulfilled in June of 2009. Dkt. 74-5. Mr.  
7 Baumgardner notes that Ruston required a second SEPA review for the grading permit, even  
8 though one had already been submitted in the Ordinance 1200 materials. Dkt. 68, at 12.  
9 Plaintiffs completed their grading permit application on July 27, 2009, and on October 7, 2009,  
10 the grading permit was issued. Dkt. 74, at 5.

11 On January 23, 2008, Ordinance 1200 was amended, to correct (according to the  
12 language in the Ordinance) "scrivener's errors" discovered by "staff" and the "property owner's  
13 representative." Dkt. 74-2, at 24. Mr. Baumgardner states that he paid nearly \$20,000.00 for  
14 Ordinance 1200 and the amendment. Dkt. 68, at 8.

15 In June of 2008, Ruston terminated its contract with HZ. Dkt. 69, at 2. Ruston then hired  
16 Villager Properties Inc. d/b/a/ North Creek Consulting ("North Creek") to provide land use  
17 planning, consulting, and services. Dkt. 74, at 2.

18 On July 31, 2009, at Mr. Baumgardner's request, Rob White, of North Creek, issued an  
19 "Administrative Interpretation" regarding Mr. Baumgardner's building height variance approved  
20 on October 16, 2006. Dkt. 74-3, at 2-17.

21 In September of 2009, Plaintiffs submitted an application for a permit to get sewer lines  
22 to the property. Dkts. 74, at 5; 77-3, at 42. Plaintiffs were informed that they needed to  
23 incorporate some changes to their plans and post a bond or execute a cash set-aside agreement.  
24 Dkt. 74, at 5-6. According to Mr. White, of North Creek, as of March 2010, Plaintiffs had not  
25 provided the updated plans or completed Ruston's request that they either post a bond or execute  
26 a cash set aside agreement before issuance of the permit. Dkt. 74, at 6. According to Mr.  
27 Baumgardner, Mr. White told him he had to pay a bond to Gig Harbor (another town in Pierce  
28

1 County, Washington). Dkt. 68, at 17. Mr. Baumgardner states that he paid the Ruston clerk the  
 2 \$1,000 bond, and then Mr. White told him that the bond was not big enough. Dkt. 68, at 17.

3 Mr. Baumgardner states that every time it rains, “Ruston’s water continues to flow over  
 4 [his] property” and the property has had several substantial landslides as a result. Dkt. 68, at 16.  
 5 Mr. Baumgardner states that as early as 2005, he has been rasing the issue of Ruston’s storm  
 6 water discharge onto his property with Ruston and Stixrood. Dkt 68, at 14-15. He states that  
 7 Mr. Stixrood has run up “huge bills ‘researching’ storm water.” Dkt. 68, at 15. He  
 8 acknowledges that he will be responsible for the storm water issues created by his development,  
 9 but doesn’t think that he should be forced to pay for the solution for Ruston’s storm water issues.  
 10 Dkt. 68, at 15-16.

11 Mr. Baumgardner asserts that there is no oversight by Ruston on the bills he receives: he  
 12 notes that he gets bills for other people’s projects. Dkt. 68, at 17. Mr. Baumgardner states that  
 13 as of March 15, 2010, he has received around \$75,000.00 in bills from Ruston. Dkt. 68, at 19.  
 14 He asserts that Ruston would then tack on a 5% administrative fee. Dkt. 68, at 19. He alleges  
 15 that HZ was allowed to generate fees without restraint. Dkt. 68, at 20.

16 Karen Carlisle, Ruston’s Town Clerk from 2000-2009, states that “the administrative fee  
 17 at five percent was not based upon actual clerk time spent on the bill, but was a flat rate charged  
 18 for any bill regardless of actual clerk time spent on processing the application.” Dkt. 72, at 5.  
 19 Karen Carlisle states that the fee schedule set in Ruston’s Ordinances 951 and 1021 were  
 20 prepared by Mr. Stixrood and the town’s attorney. Dkt. 72, at 7.

21 Mr. Baumgardner feels that due to Ruston and HZ’s delays, he missed his opportunity to  
 22 sell both of these properties when the market was considerably better. Dkt. 68, at 20. For  
 23 example, Mr. and Ms. Dan Kuchan explored purchasing Plaintiffs’ Tacoma property (4925 N.  
 24 Orchard Street) in October of 2007. Dkt. 77-3, at 18. Offers and counteroffers were made.  
 25 Dkts. 77-2, at 45-53. Mr. and Ms. Kuchan wanted to condition the sale on Mr. Baumgardner’s  
 26 getting utilities to the site within 60 days or forfeiting \$150,000. Dkt. 77-2, at 49-53. Mr.  
 27 Baumgardner would not agree. *Id.* In the spring of 2008, Mr. and Ms. Michael McLeod  
 28

1 explored purchasing the Tacoma property. Dkt. 77-4, at 10. Mr. McLeod testified that they  
 2 decided not to purchase because he and his wife met on site with an architect and were advised  
 3 that “the site would be very expensive to engineer a foundation that would secure a home on  
 4 such a very steep slope.” Dkt. 77-4, at 10. He testified that the timing regarding utilities was not  
 5 an issue. Dkt. 77-4, at 11.

6       The current mayor of Ruston, Bruce Hopkins, states that Ruston has incurred many costs  
 7 in connection with review of Mr. Baumgardner’s applications for which they have chosen not to  
 8 bill him. Dkt. 98, at 3. Mayor Hopkins states that Ruston has not made any profit from  
 9 reviewing his applications. Dkt. 98, at 4. He states that if developers like Mr. Baumgardner do  
 10 not pay their bills, it could bankrupt the town. Dkt. 98, at 4.

## 11           **B. PROCEDURAL HISTORY**

12       On March 6, 2009, Plaintiffs filed this case in Pierce County Washington, Superior  
 13 Court. Dkt. 1. Plaintiffs allege that all Defendants have violated their federal and state  
 14 constitution Due Process rights (both substantive and procedural), have “taken” their property  
 15 without compensation, and have violated their First Amendment rights. *Id.* Plaintiffs make  
 16 claims for tortious interference with a contract and negligence against all Defendants. *Id.*  
 17 Plaintiffs make a breach of contract claim against the HZ Defendants. *Id.* They assert that  
 18 Ruston’s failure to deal with its storm water run off amounts to an inverse condemnation or  
 19 trespass. *Id.* Plaintiffs seek damages, injunctive relief, attorney’s fees, and costs. *Id.*

20       Defendants removed this case to this Court based on 28 U.S.C. § 1331 (federal question  
 21 jurisdiction) and 28 U.S.C. § 1367(a) (supplemental jurisdiction). Dkt. 1.

22       Parties filed cross motions for summary judgment in March 2010. Dkts. 57, 63-65, 78-  
 23 79. On March 18, 2010, Plaintiffs were ordered to show cause why a pleading filed under seal  
 24 should not be unsealed. Dkt. 81. No responses were filed. The sealing issue is resolved below  
 25 in Section II. A.

## 26           **C. PENDING MOTIONS**

27           1.       Defendants Ruston and Transue’s Motion for Summary Judgment Re:  
 28                   Federal Claims

1 Defendants Ruston and Transue move for summary dismissal of Plaintiffs' federal claims  
 2 arguing that: 1) alleged violations of state law and negligence are insufficient to establish  
 3 liability under 42 U.S.C. § 1983, 2) Plaintiffs' takings claims are not ripe, and even if they were  
 4 ripe, Plaintiffs have not suffered a taking requiring compensation, 3) Plaintiffs' substantive and  
 5 procedural due process claims should be dismissed because they have identified only two  
 6 interests that are protected under the due process clause, and they have suffered no deprivation of  
 7 those interests, 4) Plaintiffs have not shown that their free speech rights have been violated, and  
 8 5) Defendant former Mayor Transue is entitled to qualified immunity. Dkt. 64. Defendants HZ  
 9 and Stixrood jointly move for summary dismissal of Plaintiffs' claims on these grounds. Dkts.  
 10 78 and 79.

11           2. Plaintiffs' Motion for Summary Judgment

12 Plaintiffs move for partial summary judgment against Defendants for "violating their due  
 13 process rights through unreasonable fees and processes for review services." Dkt. 63. Plaintiffs  
 14 move for "injunction banning Ruston from enforcement of Ruston Mun. Code 1.14.050 until  
 15 such time as Ruston complies with state statute to set reasonable rates for review and limit its  
 16 fees for review to the statutorily authorized categories." *Id.* Plaintiffs move for an order  
 17 dismissing "Defendant HZ's anti-SLAPP [Washington's Anti-Strategic Lawsuits Against Public  
 18 Participation] claim with prejudice and for an award of attorneys' fees and the \$10,000.00  
 19 penalty" for having to defend against the claim. *Id.*

20           3. Defendants HZ and Stixrood's Motion for Summary Judgment

21 Defendants HZ and Stixrood move for summary judgment arguing that: 1) Plaintiffs'  
 22 tort claims asserted against HZ are barred by the economic loss doctrine, 2) Plaintiffs'  
 23 negligence and negligent misrepresentation claims must be dismissed because Plaintiffs cannot  
 24 establish essential elements of their causes of action, 3) Plaintiffs' claims premised upon alleged  
 25 errors in Ordinance 1172 are barred by the statute of limitations, 4) Plaintiffs' breach of contract  
 26 claims against HZ must be dismissed because Plaintiffs cannot identify a specific contract  
 27 provision that was breached, 5) Plaintiffs' § 1983 and state constitutional claims against HZ and

1 Stixrood must be dismissed because Plaintiffs cannot establish that HZ or Stixrood were state  
 2 actors, and 6) Ruston's indemnity claims against HZ and Stixrood must be dismissed because no  
 3 basis for indemnity exists. Dkt. 57.

4. Defendants Ruston and Transue's Motions for Summary Judgment Re:  
 State Claims

5 Defendants Ruston and Transue move for summary dismissal of Plaintiffs' state law  
 6 claims, arguing that: 1) Plaintiffs' state constitutional takings claims should be dismissed  
 7 because they are either unripe or no takings occurred, 2) Plaintiffs can not show that they have  
 8 an inverse condemnation claim based upon surface water run off, 3) there is no evidence that  
 9 Ruston breached the "agreement to Pay for Town Review Services," 4) Plaintiffs' intentional  
 10 interference with a contract claim should be dismissed because no valid contract existed between  
 11 Plaintiffs and either the Kuchans or the McLeod, none of the Defendants knew of the potential  
 12 contracts, Defendants' acts were not designed to induce a breach and there was no breach or  
 13 disruption of the relationship, 5) Plaintiffs' negligence claims should be dismissed, and 6)  
 14 Defendant Transue is entitled to discretionary immunity under RCW 4.24.470. Dkt. 65.

6. Motions to Strike

7 Plaintiffs' move to strike Defendants HZ and Stixrood's Editorial Exhibits 1 and A-C.  
 12 Dkt. 106. Defendants Ruston and Baumgardner move to strike several pleadings submitted in  
 13 support of Plaintiffs' motions and responses (Dkt. 95).

**D. ORGANIZATION OF THIS OPINION**

12 This opinion will first deal with the Court's March 18, 2010, Order to Show Cause. Dkt.  
 13 81. Next, the opinion will address the various motions to strike. Dkts. 95 and 106. The opinion  
 14 will then turn to Defendants' joint motions to summarily dismiss Plaintiffs' federal claims (Dkts.  
 15 64, 78 and 79) and Plaintiffs' partial motion for summary judgment to the extent that it addresses  
 16 federal claims (Dkt. 63). Lastly, the opinion will discuss the propriety of remanding this case to  
 17 Pierce County, Washington Superior Court.

**II. DISCUSSION**

**A. SEALING OF DOCUMENTS - STANDARD**

1 Local Fed. R. Civ. P. 5(g) provides,

2 (2) There is a strong presumption of public access to the court's files. With regard  
3 to dispositive motions, this presumption may be overcome only on a compelling  
4 showing that the public's right of access is outweighed by the interests of  
5 the public and the parties in protecting the court's files from public review....  
6 (3) If a party seeks to have documents filed under seal and no prior order in  
7 the case or statute specifically permits it, the party must obtain authorization  
8 to do so by filing a motion to seal or a stipulation and proposed order requesting  
9 permission to file specific documents under seal. The court will allow parties to  
file entire memoranda under seal only in rare circumstances. A motion or  
stipulation to seal usually should not itself be filed under seal. A declaration or  
exhibit filed in support of the motion to seal may be filed under seal if  
necessary. If possible, a party should protect sensitive information by  
redacting documents rather than seeking to file them under seal. A motion  
or stipulation to seal should include an explanation of why redaction is not  
feasible.

10 Parties filed cross motions for summary judgment in March 2010. Dkts. 57, 63-65, 78-

11 79. On March 15, 2010, Plaintiffs filed, under seal, a pleading entitled "Exhibit 35 to  
12 Declaration of Joan K. Mell" in support of their Motion for Summary Judgment. Dkt. 76.

13 Plaintiffs did not file a motion to seal this document, nor is there a prior order in the record  
14 permitting it to be filed under seal pursuant to Local Fed. R. Civ. P. 5(g). On March 18, 2010,  
15 Plaintiffs were ordered to show cause why that pleading should not be unsealed. Dkt. 81.

16 Parties failed to respond to the Court's March 18, 2010, Order to Show Cause (Dkt. 81).

17 Accordingly, no showing has been made under Local Fed. R. Civ. P. 5(g). The pleading entitled  
18 "Exhibit 35 to Declaration of Joan K. Mell" (Dkt. 76) should be unsealed.

19 **B. MOTIONS TO STRIKE**

20 Fed. R. Civ. P. 56 (e) provides that affidavits filed supporting or opposing summary  
21 judgment must be "made on personal knowledge, set out facts that would be admissible in  
22 evidence, and show that the affiant is competent to testify on the matters stated."

23 Plaintiffs move to strike Defendants HZ and Stixrood's "Exhibit 1 to [HZ's] Reply in  
24 Support of Summary Judgment Inaccurate Record References in Plaintiffs Response to [HZ's]  
25 Motion" (Dkt. 88, at 15-18). Dkt. 106. Plaintiffs move to strike Defendants' HZ's "Exhibit A, B  
26 and C to [HZ's] Opposition to Plaintiffs' Motion for Summary Judgment" (Dkt. 90-2, at 1-16).

27 *Id.*

1 Plaintiffs' motion to strike (Dkt. 106) should be granted and the pleadings stricken.  
 2 These pleadings contain inadmissible opinion testimony of legal counsel. Fed. R. Civ. P. 701  
 3 and 702. The exhibits were not relied upon in deciding the pending motions.

4 Defendants Ruston and Stixrood move to strike portions of the Plaintiffs' pleadings. Dkt.  
 5 95. Defendants' motion regarding Plaintiffs' character evidence should be granted insofar as it  
 6 is offered to show conformity therewith on a particular occasion, Fed. R. Civ. P. 403, and but  
 7 denied insofar as it is offered to provide general background information.

8 Defendants' motion to strike Plaintiffs' submissions containing opinions on matters of  
 9 law should be granted. *See United State v. Poschwaata*, 829 F.2d 1477, 1483 (9th Cir. 1987).

10 Defendants Ruston and Stixrood move to strike portions of Baumgardner's declaration  
 11 (Dkt. 68) and his attorney, Ms. Mell's, declaration (Dkt. 66) as inadmissible hearsay under Fed.  
 12 R. Ev. 802. Dkt. 95. The motion should be granted as to Mr. Baumgardner's assertions about  
 13 purported complaints from other developers and assertions that the prior owners were unhappy  
 14 with Ordinance 1172. The motion to strike based on hearsay in Ms. Mell's declaration should be  
 15 granted as to the unverified "timeline" she created. The motion to strike based on hearsay  
 16 should be denied in all other respects.

17 Defendants move to strike the Baumgardner Declaration (Dkt. 68) due to lack of personal  
 18 knowledge. Dkt. 95. Defendants' motion to strike should be granted as to the amount of profit  
 19 HS may have made and Transue's work ethic. It should be denied in all other respects.

20 Defendants' motion regarding settlement discussions should be granted pursuant to Fed.  
 21 R. Ev. 408.

22 Defendants' motion to strike (Dkt. 95) irrelevant matters should be granted as to  
 23 complaints of other developers about other developments, the state auditor performance report  
 24 relating to eight other counties (to the extent it did not concern Ruston), and the 2006 state  
 25 auditor's report which did not address land use fees. It should be denied in all other respects.

27 These evidentiary rulings apply to these motions only. In any event, much of the  
 28

1 testimony Defendants seek to strike was not relevant to the questions considered in this opinion  
 2 and so was not considered.

3 **C. SUMMARY JUDGMENT - STANDARD**

4 Summary judgment is proper only if the pleadings, depositions, answers to  
 5 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
 6 genuine issue as to any material fact and the moving party is entitled to judgment as a matter of  
 7 law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the  
 8 nonmoving party fails to make a sufficient showing on an essential element of a claim in the case  
 9 on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
 10 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could  
 11 not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v.*  
 12 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific,  
 13 significant probative evidence, not simply "some metaphysical doubt."); *See also* Fed. R. Civ. P.  
 14 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence  
 15 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions  
 16 of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v.*  
 17 *Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

18 The determination of the existence of a material fact is often a close question. The court  
 19 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –  
 20 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec.*  
*Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of  
 22 the nonmoving party only when the facts specifically attested by that party contradict facts  
 23 specifically attested by the moving party. The nonmoving party may not merely state that it will  
 24 discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial  
 25 to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).  
 26 Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be  
 27 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

1           **D. FEDERAL CLAIMS BROUGHT UNDER 42 U.S.C. § 1983**

2           “Section 1983 provides remedies for deprivations of rights under the Constitution and  
 3 laws of the United States when the deprivation takes place under color of any statute, ordinance,  
 4 regulation, custom, or usage, of any State or Territory.” *Caviness v. Horizon Community*  
 5 *Learning Center, Inc.*, 590 F.3d 806, 812 (9th Cir. 2010)(quoting *Gorenc v. Salt River Project*  
 6 *Agric. Improvement & Power Dist.*, 869 F.2d 503, 505 (9th Cir.1989))(internal quotation marks  
 7 omitted). The conduct allegedly causing the deprivation of a federal right must be fairly  
 8 attributable to the State. *Id.* The state-action element in § 1983 “excludes from its reach merely  
 9 private conduct, no matter how discriminatory or wrongful.” *Id.* (internal citations omitted).

10          “[G]overnment officials performing discretionary functions generally are shielded from  
 11 liability for civil damages insofar as their conduct does not violate clearly established statutory  
 12 or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*,  
 13 457 U.S. 800, 818 (1982). “Through application of the qualified immunity doctrine, public  
 14 servants avoid the general costs of subjecting officials to the costs of trial - distraction of  
 15 officials from their governmental duties, inhibition of discretionary action, and deterrence of able  
 16 people from public service.” *V-1 Oil Co. v. Smith*, 114 F.3d 854, 857 (9th Cir. 1997)(internal  
 17 citations omitted).

18          Plaintiffs make federal constitutional claims against Ruston and former Mayor Transue  
 19 and private actors HZ and Stixrood. Dkt. 1. HZ and Stixrood argue that they are not “state  
 20 actors” and therefore cannot be held liable for a constitutional violation. Dkt. 57. Ruston and  
 21 Defendant former Mayor Michael Transue do not dispute that they are “state actors” for the  
 22 purpose of potential constitutional liability under § 1983, but argue that Transue is entitled to  
 23 qualified immunity. Dkt. 64. In order to determine both questions (whether private actors are  
 24 “state actors” and whether qualified immunity applies), the Court should first reach the question  
 25 of whether a constitutional right has been violated. *Villegas v. Gilroy Garlic Festival Ass'n*, 541  
 26 F.3d 950, 954-55 (9th Cir. 2008)(“The first inquiry was whether the claimed deprivation has  
 27 resulted from the exercise of a right or privilege having its source in state authority. The second

1 was whether, under the facts of this case, the private parties, may be appropriately characterized  
 2 as state actors.”)(*internal citations omitted*); and *Pearson v. Callahan*, 129 S.Ct. 808, (2009)  
 3 (although no longer mandatory, in order to determine whether a government official is entitled to  
 4 qualified immunity, it is helpful to examine first whether a constitutional violation occurred and  
 5 then whether if there was a violation whether the rights were clearly established)((*internal*  
 6 *citations omitted*). As stated in Section II. D. 1.-4. below, Plaintiffs have failed to show that they  
 7 have suffered a federal constitutional violation. Accordingly, no further analysis on either the  
 8 “state actor” doctrine or the qualified immunity defense is necessary. *See Villegas*, at 955; and  
 9 *Saucier v. Katz*, 533 U.S. 194, 201 (2001). This opinion now will address each of Plaintiffs’  
 10 federal constitutional claims.

11           1.     Takings Claim

12       Defendants move to dismiss Plaintiffs’ federal constitutional takings claim. Dkts. 64, 78,  
 13 79, and 113. The final Clause of the Fifth Amendment provides: “nor shall private property be  
 14 taken for public use, without just compensation.” U.S. Const. amend. V. The Fifth Amendment  
 15 applies to the States as well as the Federal Government. *Chicago B. & Q.R. Co. v. Chicago*, 166  
 16 U.S. 226, 239 (1897). Plaintiffs challenging government action as uncompensated takings of  
 17 private property may proceed under one of four theories: (1) a physical invasion of property, (2)  
 18 that a regulation completely deprives a plaintiff of all economically beneficial use of property,  
 19 (3) a general regulatory takings challenge pursuant to *Penn Central Transp. Co. v. City of New*  
 20 *York*, 438 U.S. 104 (1978), or (4) a land-use exaction violating the standards set forth in *Nollan*  
 21 *v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374  
 22 (1994). *McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008) (*citing Lingle v.*  
 23 *Chevron U.S.A. Inc.*, 544 U.S. 528, 548, (2005)).

24       Plaintiffs acknowledge that they are not basing their takings claim on an assertion that  
 25 the Defendants’ actions have completely deprived them of all economically beneficial use of the  
 26 property. Dkt. 100, at 3. Plaintiffs argue that “this case concerns the physical invasion of  
 27 [Plaintiffs’] property and the extraction of unreasonable regulations and fees from [their]

1 development.” Dkt. 100, at 3. Plaintiffs argue that Ruston’s requirement in Ordinance 1200,  
 2 that they dedicate a ten foot public viewing area (with guard rail) on the top of the slope,  
 3 amounts to a “physical invasion” of their property. Dkt. 100, at 3. Plaintiffs also base their  
 4 takings claim on Ruston’s “refusal to remediat[e] its storm water” and on Plaintiffs’ allegations  
 5 that they were charged unreasonable fees under Ruston’s application review fee ordinance. Dkt.  
 6 100, at 2-3.

7 Defendants argue that Plaintiffs’ Fifth Amendment takings claim should be dismissed  
 8 because it is not ripe. Under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473  
 9 U.S. 172 (1985), a Plaintiff’s federal takings claim is not ripe until (1) the government entity  
 10 charged with implementing the regulations has reached a final decision regarding the application  
 11 of the regulations to the property at issue, and (2) the Plaintiff has sought compensation through  
 12 the procedures the state has provided for doing so, unless such action would be futile.

13 Plaintiffs have failed to show that their takings claim, based upon Ordinance 1200’s  
 14 requirement of a public viewing area, is ripe. Parties do not contest that passage of Ordinance  
 15 1200 was a final land use decision. Defendants point out that Plaintiffs did not seek redress  
 16 through Washington’s Land Use Procedures Act (“LUPA”). Dkts. 64, and 113. LUPA is the  
 17 “exclusive means of judicial review of land use decisions” with certain exceptions. *James v.*  
 18 *County of Kitsap*, 154 Wash. 2d 574, 583 (2005). To have standing to bring a land use petition  
 19 under LUPA, the petitioner must have exhausted his or her administrative remedies . . . . [and]  
 20 filed for judicial review . . . within 21 days of the issuance of the land use decision.” *Id.*, (citing  
 21 RCW 36.70C.040(3), .060(2)(d)). Plaintiffs did not bring a LUPA action to challenge this  
 22 decision. “[A] taking is not complete until compensation for a deprivation has been sought and  
 23 denied.” *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 657 (9th Cir.  
 24 2003). Plaintiff makes no showing that such an action would have been futile. Plaintiffs’  
 25 takings claim, based upon Ordinance 1200’s requirement of a public viewing area, should be  
 26 dismissed.

27 Plaintiffs’ takings claim based on Ruston’s “refusal to remediate its storm water” should  
 28

1 also be dismissed as unripe under *Williamson*. Plaintiffs have failed to point to a final decision.  
 2 Plaintiffs have failed to seek relief from the state court or show that seeking such relief would be  
 3 futile. To the extent Plaintiffs base their takings claim on Ruston's "refusal to remediate its  
 4 stormwater" the claim should be dismissed.

5 Plaintiffs' final basis for their takings claim is that they were charged unreasonably high  
 6 fees under Ruston's land use application review fee ordinance. Dkt. 100, at 2-5. This factual  
 7 basis for a takings claim is insufficient. As to *Williamson* ripeness, Plaintiffs argue that the  
 8 application review fees are not really land use decisions, and so are exempt from review under  
 9 LUPA. Dkt. 63, at 29-30. RCW 36.70C.030(1)(c) expressly exempts claims for "monetary  
 10 damages or compensation" from the procedures, standards, and deadlines set forth in LUPA.  
 11 The Washington Supreme Court however, has found that the imposition of impact fees as a  
 12 condition on the issuance of a building permit was a "land use decision" under LUPA, in a case  
 13 which merely sought "monetary damages or compensation" for fees charged. *James v. County of*  
 14 *Kitsap*, 154 Wash. 2d 574, 583 (2005). The Washington Supreme Court held that the imposition  
 15 of an impact fee was not reviewable unless a party timely challenges that decision within  
 16 twenty-one days of its issuance pursuant to LUPA. *James*, 154 Wn.2d at 586-87. The dissent  
 17 argued that a challenge to the government's decision to issue or withhold a permit is distinct from  
 18 a challenge to the imposition of illegal fees or taxes. *Id.* at 591-94. However, the majority  
 19 expressly found that the government's decision to exact a fee as a condition for granting the  
 20 developer's building permit constituted a land use decision and not a revenue decision. *Id.* at  
 21 583-84. Plaintiffs here argue that impact fees and application fees are different. Dkt. 63, at 29-  
 22 30. They argue that impact fees are assessed at the time of the land use decision, and are a  
 23 condition of the decision. *Id.* They argue that application review fees are not conditioned on  
 24 any land use decision, but are ongoing until the project is complete. *Id.*

25 Plaintiffs' argument that the fees are "ongoing" becomes problematic because, then, these  
 26 bills are not "final decisions" as required under *Williamson*. Moreover, Defendants have shown  
 27 a willingness to adjust the fees in the past, and so it is not wholly clear that each bill was a "final

1 decision.” Complicating matters, Plaintiffs complain that further action on their applications was  
 2 halted until they paid the bills. Dkt. 63.

3 Assuming, without finding, that the LUPA statue does not apply to application and  
 4 review fees, Plaintiffs fail to address whether other state court remedies are or are not available.  
 5 Plaintiffs do not address whether a claim could be brought directly under RCW 82.08.020.  
 6 RCW 82.08.20 permits cities or municipal corporations to collect “reasonable fees from an  
 7 applicant for a permit or other governmental approval to cover the cost to the city, . . . or other  
 8 municipal corporation of processing applications, inspecting and reviewing plans, or preparing  
 9 detailed statements” required by the State Environmental Protection Act (“SEPA”). Plaintiffs  
 10 make no showing that raising a claim under this statute would be futile. Additionally, Plaintiffs  
 11 assert a breach of contract claim here that may result in the relief they request. Plaintiffs also fail  
 12 to address whether relief would be futile by asserting a claim under RCW 64.40.050, which  
 13 provides “[o]wners of a property interest who have filed an application for a permit have an  
 14 action for damages to obtain relief from acts of an agency which are arbitrary, capricious,  
 15 unlawful, or exceed lawful authority, or relief from a failure to act within time limits established  
 16 by law.”

17 In any event, even assuming that this claim is ripe under *Williamson*, Plaintiffs fail to cite  
 18 any authority that the fees charged pursuant application review amount to “takings” requiring  
 19 compensation under the constitution. The U.S. Supreme Court has held that user fees do not  
 20 constitute “takings” requiring just compensation. *U.S. v. Sperry Corp.*, 493 U.S. 52, (1989). In  
 21 that case, the recipient of a claim award from the Iran-United States Claims Tribunal brought suit  
 22 against the United States for recovery of a fee that the United States charged for him to receive  
 23 payment of his claim. *Id.* The U.S. Supreme Court held that the fee required by statute to be  
 24 paid to the United States from amount recovered was a user fee rather than an unconstitutional  
 25 taking. *Id.* Here, Plaintiffs chose to request governmental services when they made their various  
 26 land use applications. Accordingly, these fees are user fees and no showing has been made that  
 27 they are “takings.” In *Sperry*, the plaintiff argued that the fee could not be considered a user fee

1 because there had “been no showing that the amount of the deduction approximate[d] the cost of  
 2 the Tribunal to the United States or [bore] any relationship to Sperry’s use of the Tribunal or the  
 3 value of the Tribunal’s services to Sperry.” *Id.*, at 393-94. The Court rejected his argument,  
 4 holding that a user fee need not “be precisely calibrated to the use that a party makes of  
 5 Government services.” *Id.*, at 394. “Nor does the Government need to record invoices and  
 6 billable hours to justify the cost of its services.” *Id.* All that is “required is that the user fee be a  
 7 ‘fair approximation of the cost of benefits supplied.’” *Id.* There is sufficient evidence in the  
 8 record here to show, for the federal takings claim analysis only, that the fee assessments were a  
 9 “fair approximation of the cost of the benefits supplied.” Plaintiffs’ takings claim based upon  
 10 the fees he has been charged under Ruston’s land use application fee statute should be dismissed.  
 11

12 Defendants’ motion to summarily dismiss Plaintiffs’ takings claim should be granted and  
 13 the takings claim dismissed. This ruling does not foreclose Plaintiffs’ due process claim,  
 14 however. “A challenge to land use regulation may state a substantive due process claim, so long  
 15 as the regulation serves no legitimate governmental purpose.” *North Pacifica LLC v. City of  
 16 Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008)(*internal citations omitted*). This opinion will now  
 17 examine the motions related to Plaintiffs due process claims.

18           2.       Due Process Claims

19           Defendants seek summary dismissal of Plaintiffs’ due process claims. Dkts.64, 78, 79,  
 20 and 113. Plaintiffs make a cross motion for summary judgment on their due process claim based  
 21 upon the fees they were charged under Ruston’s application review fee ordinance. Dkts. 63 and  
 22 108.

23           a.       *Substantive and Procedural Due Process Claims - Protected  
 24 Interest?*

25           To state a substantive or procedural due process claim, the plaintiff must show as a  
 26 threshold matter that a state actor deprived them of a constitutionally protected life, liberty, or  
 27 property interest. *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008).

28           Plaintiffs argue, in response to Defendants’ summary judgment motion, that Mr.

Baumgarder’s “substantive due process and procedural due process claims are founded on his fundamental rights to develop his land. He has protected property interests in his land and his resources. He has protected interests in reasonable regulatory controls and reasonable regulatory fees.” Dkt. 100, at 6.

### i. Constitutionally Protected Interest in Developing Land ?

Turning first to Plaintiffs argument that they have a fundamental right to “develop [their] land,” Plaintiffs fail to cite any authority for this extremely general proposition. In fact, the Ninth Circuit has noted that a landowner does not have an “unconditional right under the taking or deprivation clauses of the federal Constitution to build any particular project he chooses.” *Lakeview Development Corp. v. City of South Lake Tahoe*, 915 F.2d 1290 (1990). Closer examination of the interests that Plaintiffs assert are protected is more helpful.

ii. Constitutionally Protected Interests Regarding Street Vacation Ordinance and Building Heights Variance?

To the extent that Plaintiffs base their due process claims on the conditions imposed on the street vacation ordinances, Plaintiffs have not shown that they had a protected property interest in avoiding those conditions or the manner in which the streets were vacated. Further, Plaintiffs have not shown that they had a protected interest in avoiding the conditions placed on their ability to prune trees and shrubs on the steep slope which was a part of the building height variance that they were granted.

“A statute that grants the reviewing body unfettered discretion to approve or deny an application does not create a property right.” *Thornton v. City of St. Helens*, 425 F.3d 1158, 1165 (9th Cir. 2005). Ruston has discretion on whether or not to vacate public streets. *See Puget Sound Alumni of Kappa Sigma v. Seattle*, 70 Wn.2d 222, 227 (1967). Ruston has the discretion to require property owners who request street vacations to pay for property vacated. RCW 35.79.030. The Washington Supreme Court has upheld the payment of cash for vacated street, an exchange of property, and permitted the retention of easements as all part of the “payment” contemplated in RCW 35.79.030. *Greater Harbor 2000 v. City of Seattle*, 132 Wash.2d 267 (1997). Similarly, Plaintiffs cite to no authority which would limit Ruston’s ability

1 to grant or deny Plaintiffs' building height variance, including placing conditions on trimming  
 2 trees and shrubs on the steep slope. “[A] benefit is not a protected entitlement if government  
 3 officials may grant or deny it in their discretion.” *Town of Castle Rock, Colo. v. Gonzales*, 545  
 4 U.S. 748, 756 (2005).

5 Even if the condition for a public viewing area, for example, was not authorized by RCW  
 6 35.79.030, violation of state law does not necessarily give rise to a constitutionally protected due  
 7 process interest. *Shanks*, at 1089. The erroneous “assumption that every state law violation  
 8 invariably gives rise to a substantive due process claim is inconsistent with the principle that  
 9 substantive due process is not a ‘font of tort law’ that superintends all official decision making.”  
 10 *Id.* Plaintiffs have not shown that they had a protected due process interest regarding Ruston’s  
 11 decision to grant their request to vacate a portion of Court Street and the alley in exchange for  
 12 the public viewing area and reservation of the hammerhead emergency vehicle turnaround. This  
 13 is also true of requirements placed on Plaintiff’s request for a variance on building height  
 14 limitations conditioned upon limitations to pruning trees and shrubs on the steep slope. To the  
 15 extent that Plaintiffs’ claims are based upon street vacation and zoning variances, it should be  
 16 dismissed.

17                   iii. Constitutionally Protected Interest in “Reasonable Fees” Under RCW  
18                   82.08.020?

19 Plaintiffs, in their motion for summary judgment and in response to Defendants’ motion  
 20 for summary judgment, also point to RCW 82.08.020, arguing that the state has removed the  
 21 local jurisdiction’s discretion in the amount of fees that can be charged in connection with an  
 22 application for land use. Dkt. 63, at 15. Accordingly, Plaintiffs contend that they have a  
 23 protected due process interest in the charge of “reasonable fees” for review of their land use  
 24 applications. *Id.*

25                   This Court is mindful of the Ninth Circuit’s warning that “a federal court should not  
 26 decide federal constitutional questions where a dispositive non-constitutional ground is  
 27 available. This rule against unnecessary constitutional adjudication applies even when neither  
 28 the trial court nor the parties have considered the non-constitutional basis for decision.” *City of*

1     *Los Angeles v. County of Kern*, 581 F.3d 841, 846 (2009). Plaintiffs have not made a sufficient  
 2 showing that they could not challenge the reasonableness of these fees by simply bringing a  
 3 claim under the state statute, through breach of contract action, or RCW 64.40.050.

4           That consideration aside, Plaintiffs have not convincingly shown that they have a  
 5 protected due process interest that results from RCW 82.08.020. “The Supreme Court has  
 6 repeatedly held that state statutes may create liberty interests that are entitled to the procedural  
 7 protections of the Due Process Clause of the Fourteenth Amendment.” *Carlo v. City of Chino*,  
 8 105 F.3d 493, 497 (9th Cir. 1997)(*emphasis added*). “Property interests are not created by the  
 9 Constitution but by existing rules or understandings that stem from an independent source such  
 10 as state law-rules or understandings that secure certain benefits and that support claims of  
 11 entitlement to those benefits.” *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164  
 12 (2005)(*internal citations omitted*). To have a property interest in a government benefit, “a  
 13 person clearly must have more than an abstract need or desire for it. He must have more than a  
 14 unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Id.*  
 15 The Ninth Circuit uses a “mandatory language test to determine that state statutes or regulations  
 16 have created a liberty interest within the meaning of the Fourteenth Amendment.” *Carlo*, at 498.  
 17 Whether a statute creates a property interest depends on “the extent to which the [governing]  
 18 statute contains mandatory language that restricts the discretion” of the decision makers.  
 19 *Thornton*, at 1164.

20           The statutory language here does not contain language that is sufficiently “mandatory” to  
 21 create a protected due process interest. The statute permits the collection of “reasonable fees to  
 22 cover the cost to the city, . . . or other municipal corporation of processing applications,  
 23 inspecting and reviewing plans, or preparing detailed statements” required by SEPA. RCW  
 24 82.08.20. The phrase “reasonable fees” gives cities a great deal of discretion in the amount of  
 25 fees they choose to charge, if they choose to do so at all. The statute uses other generalized  
 26 language for the services that they are permitted to charge. The statutory language here does not  
 27 create “a legitimate claim of entitlement.” To the extent that Plaintiffs base their due process  
 28

1 claims on RCW 82.08.20, their claim should be dismissed. Plaintiffs' motion for summary  
 2 judgment on this issue should be denied, and Defendants' motion to summarily dismiss the claim  
 3 on this factual basis should be granted.

4                  iv. Constitutionally Protected Interest in "Accurate Billing"?

5 Plaintiffs assert that they have a constitutionally protected interest in "accurate billing."  
 6 Dkt. 63, at 15 (*citing Memphis Light, Gas and Water Division*, 436 U.S. 1 (1978)). In *Memphis*  
 7 *Light*, the Supreme Court examined the specific language in the Tennessee statute and state court  
 8 decisions regarding the statute. *Id.* They held that because the utility could terminate service  
 9 only "for cause," the Plaintiffs had a "legitimate claim of entitlement" within the protection of  
 10 the Due Process Clause. *Id.* Plaintiffs fail to point to a sufficiently specific statute which would  
 11 entitle them to "accurate billing" such that they would be entitled to constitutional protection.

12                  v. Constitutionally Protected Interest in Proper Delegation for City  
Planning Services to Private Entity?

13 Plaintiffs fail to identify a constitutionally protected interest implicated in Ruston's  
 14 decision to contract with HZ for land use planning purposes. Plaintiffs point out that the state  
 15 constitution prohibits contracting away the power of taxation, and they assert when Ruston  
 16 contracted with HZ to provide these services and then passed the bill on to the applicants, Ruston  
 17 had contracted away the power of taxation. Dkt. 63. Plaintiffs' argument ignores the undisputed  
 18 fact that Ruston paid HZ's bills, and it is the Town Council that made the final decisions on the  
 19 land use applications. Moreover, under Washington law, taxes are defined by their purposes:  
 20 they are imposed to raise money for the public treasury. *Okeson v. City of Seattle*, 150 Wn.2d  
 21 540, 551 (2003). There is no indication here that the fees charged were imposed to raise money  
 22 for Ruston's treasury. Moreover, RCW 82.02.020 allow cities to assess charges to "cover the  
 23 cost to the city." Ruston points out that it paid the bills HZ submitted. Dkt. 97, at 3. Plaintiffs  
 24 have not shown that these charges were not costs to Ruston. Plaintiffs' due process claims,  
 25 based on this factual basis, should be dismissed.

26                  vi. Constitutionally Protected Interest in Applications for Grading Permit  
and Lot Segregation?

1 Defendants concede that Plaintiffs have a state created protectable due process interest in  
 2 their applications for a grading permit and lot segregations. Dkt. 64, at 16 (*citing Mission*  
 3 *Springs v Spokane*, 134 Wn.2d 947, 965 (1998)). Whether there is sufficient evidence of a  
 4 violation of these interests will be addressed below.

5           b.     *Due Process Claims - Violation?*

6       Plaintiffs applications for a grading permit and lot segregation were both approved.  
 7 Dkts. 74, at 5 and 74-3, at 25 respectively. Plaintiffs argue that it took far too long for their  
 8 grading permit application and their lot segregation application to be approved. Dkt. 63.

9       To maintain a substantive due process claim, Plaintiffs must show that Ruston's delays in  
 10 processing their applications lacked a rational relationship to a government interest. *North*  
 11 *Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 485 (9th Cir. 2008).

12      Insofar as the lot segregation application was concerned, Plaintiffs do not meaningfully  
 13 respond to Defendants' argument that approval of the lot segregation was a county function, and  
 14 that the county could have acted without Ruston's approval. Plaintiffs have not shown sufficient  
 15 evidence in the record to conclude that Defendants violated their due process rights based upon  
 16 the length of time it took to approve their lot segregation application. To the extent that they base  
 17 their due process claim on the time it took for approval of their lot segregation application, the  
 18 claim should be dismissed.

19      Insofar as their due process claim is based upon the time it took to get their grading  
 20 permit, Plaintiffs' due process claim should be denied. Plaintiffs' delay in processing due  
 21 process claim is similar to the Plaintiff's claim in *North Pacifica LLC v. City of Pacifica*, 526  
 22 F.3d 478 (9th Cir. 2008). In *North Pacifica* the Ninth Circuit examined a case where the  
 23 Plaintiff alleged that the City violated its substantive due process rights by repeatedly sending  
 24 requests for more information that delayed the processing of Plaintiff's land use application. 526  
 25 F.3d at 485. The Court found that "the complaint demonstrate[d] that, each time the City sent a  
 26 request for more information, it explained that it was requesting relevant information it did not  
 27 have or information that would allow it to conduct a thorough review." *Id.* It held that there was

1 “a reasonable explanation on the face of the complaint for every delay in the City's eventual  
 2 approval of the application. The City's repeated information requests thus did not violate the  
 3 [plaintiff's] substantive due process rights by making unreasonable requests that delayed the  
 4 project.” *Id.* Here, the grading permit was approved soon after Plaintiffs completed their  
 5 application. The record indicates that Defendant Stixrood responded to Plaintiffs' October 2007  
 6 grading permit application on December 3, 2007. Dkt. 74-3, at 58. He reminded Plaintiffs that  
 7 the application was incomplete absent the dedication of the emergency vehicle turn around and  
 8 that they had submitted an incomplete grading plan. Dkt. 74-3, at 58. The first requirement -  
 9 the deed granting the property for the turn around - was fulfilled in June of 2009. Dkt. 74-5.  
 10 Plaintiffs completed their grading permit application on July 27, 2009, and on October 7, 2009,  
 11 the grading permit was issued. Dkt. 74, at 5. Plaintiffs have not shown sufficient evidence in the  
 12 record to conclude that Defendants violated their due process rights based upon the length of  
 13 time it took to approve their lot grading permit.

14 To the extent that Plaintiffs base their due process claim upon Ruston's requirement that  
 15 they submit another SEPA with the grading permit, the claim should be dismissed. Plaintiffs  
 16 have not shown that Ruston's requirement of an additional SEPA violated their due process  
 17 rights. The Court has “long eschewed … heightened means-ends scrutiny when addressing  
 18 substantive due process challenges to government regulation.” *Shanks v. Dressel*, 540 F.3d  
 19 1082, 1087 (9th Cir. 2008) (*quoting Lingle*, 544 U.S. at 545). Accordingly, the “irreducible  
 20 minimum” of a substantive due process claim challenging land use action is failure to advance  
 21 any legitimate governmental purpose. *Id.* “When executive action like a discrete permitting  
 22 decision is at issue, only egregious official conduct can be said to be arbitrary in the  
 23 constitutional sense: it must amount to an abuse of power lacking any reasonable justification in  
 24 the service of a legitimate governmental objective.” *Id.*, at 1089. Plaintiffs make no showing  
 25 that Ruston's request for another SEPA failed to advance any legitimate public purpose. The  
 26 “exceedingly high burden” required to show that Ruston, HZ, or their “employees behaved in a  
 27 constitutionally arbitrary fashion has not been met here.” *Shanks*, at 1087 (*internal citation*  
 28

1 *omitted*). To the extent Plaintiffs assert these actions as a basis for their due process claim,  
 2 Defendants' motions should be granted and Plaintiffs' claim should be dismissed.

3 To the extent that Plaintiffs base their due process claim on the time it has taken for  
 4 Ruston to make a decision on their utility permits, Plaintiffs have made no showing that the  
 5 additional items Ruston has requested for the permit to be considered "complete" failed to  
 6 advance "any legitimate public purpose." Moreover, according to the record, the application is  
 7 still pending.

8 Plaintiffs procedural due process claim should be dismissed. To obtain relief on a  
 9 procedural due process claim, the plaintiff must establish the existence of "(1) a liberty or  
 10 property interest protected by the Constitution; (2) a deprivation of the interest by the  
 11 government; [and] (3) lack of process." *Shanks v. Dressel*, 540 F.3d 1082, 1087, 1090 (9th Cir.  
 12 2008) (*citing Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir.1993)). Plaintiffs  
 13 have failed to show that they have suffered a deprivation of a liberty or property interest  
 14 protected by the constitution. Accordingly, Defendants' motion to dismiss their procedural due  
 15 process claim should be granted. This opinion will now turn to Plaintiffs' final federal claim.

16           3.       Free Speech Claims

17 Plaintiffs allege that after Mr. Baumgardner began to complain about the bills from  
 18 Ruston that were generated by HZ's work, the Defendants retaliated against them, violating their  
 19 speech rights. Dkt. 63.

20 "In recognizing one's protected interest in commenting on government officials' actions,  
 21 we have stated that it is clear that state action designed to retaliate against and chill political  
 22 expression strikes at the heart of the First Amendment." *CarePartners, LLC v. Lashway*, 545  
 23 F.3d 867, 877 (9th Cir 2008) (*internal citations omitted*). Acts of seeking administrative review  
 24 of government decisions are protected by the right to petition the government. *Id.*

25 Mr. Baumgardner's complaints about the size of the bills generated by HZ's work that  
 26 Ruston sent him were protected political speech. After Mr. Baumgardner received the bill in  
 27 January of 2007 for around \$45,000, he emailed people at HZ and Mayor Transue. Dkts. 66-2,

1 at 3 and 58-3. He had conversations with people at City Hall, and with members of the Town  
2 Council about the bill. Dkt. 68 at 13-14. He raised the issue via email and at meetings. Dkt. 68,  
3 at 13-14. These actions were sufficient attempts to seek review of a governmental decision to be  
4 protected by the First Amendment.

5 “A plaintiff alleging retaliation for the exercise of constitutionally protected rights must  
6 initially show that the protected conduct was a substantial or motivating factor in the defendant's  
7 decision.” *CarePartners*, at 877 (*internal citations omitted*). “[T]he “burden shifts to the  
8 defendant to establish that it would have reached the same decision even in the absence of the  
9 protected conduct. To meet this burden, a defendant must show by a preponderance of the  
10 evidence that it would have reached the same decision; it is insufficient to show merely that it  
11 could have reached the same decision.” *Id.*

12 “The plaintiffs are required, however, to provide more than mere evidence” that the  
13 defendants were aware of their expressive conduct in order to establish a genuine material  
14 dispute as to whether retaliation was a substantial or motivating factor. *Alpha Energy Savers,*  
15 *Inc. v. Hansen*, 381 F.3d 917, 929 (2004). In addition, the plaintiffs must: (I) establish proximity  
16 in time between the expressive conduct and the allegedly retaliatory actions; (ii) produce  
17 evidence that the defendants expressed opposition to the speech, either to him or to others; or  
18 (iii) demonstrate that the defendants' proffered explanations for their adverse actions were false  
19 and pretextual. *Id.*

20 Plaintiffs have failed to show proximity in time between the expressive conduct and the  
21 allegedly retaliatory actions or that Defendants' proffered explanations were false and pretextual.  
22 Plaintiffs argue that when he complained about the bills, his applications were suddenly  
23 “incomplete.” Dkt. 63, at 28. The two “incomplete” applications were the application for a  
24 grading permit and application for lot segregation. Review of the record shows that they were  
25 not complete, in part, because Plaintiffs had not dedicated land for an emergency vehicle access  
26 turnaround in compliance with Ordinance 1200. Plaintiffs make no showing that the  
27 applications were, in fact, complete. They argue that when Mr. Baumgardner refused to pay,  
28

1 Defendants retaliated against him by refusing to process his other requests. Dkt. 63, at 28.  
 2 Plaintiffs fail to point which request was not processed because he was complaining about his  
 3 bills. Moreover, Plaintiff makes no showing that even if Defendants stopped processing his  
 4 requests that it was because he was complaining about his bills, and not because he was not  
 5 paying the bills.

6 As to whether Plaintiffs have shown that Defendants opposed his speech, Plaintiffs allege  
 7 that after complaining about the first bill of \$45,000 in January of 2007, Mr. Baumgardner  
 8 received more charges - that is he was billed for his billing questions. Dkt. 63, at 27. Plaintiffs  
 9 have not shown that being billed for billing questions was in retaliation for the complaints. It  
 10 only shows that the HZ Defendants billed for more work done for Plaintiffs.

11 Plaintiffs have failed to show that Mr. Baumgardner's complaints about HZ's bills were a  
 12 substantial or motivating factor behind Defendants actions. Defendants' motions to summarily  
 13 dismiss Plaintiffs' First Amendment claims should be granted.

14 **E. SUPPLEMENTAL JURISDICTION**

15 Pursuant to 28 U.S.C. § 1367(c), district courts may decline to exercise supplemental  
 16 jurisdiction over a state law claims if (1) the claims raise novel or complex issues of state law,  
 17 (2) the state claims substantially predominate over the claim which the district court has original  
 18 jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction,  
 19 (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.  
 20 "While discretion to decline to exercise supplemental jurisdiction over state law claims is  
 21 triggered by the presence of one of the conditions in § 1367(c), it is informed by the values of  
 22 economy, convenience, fairness, and comity." *Acri v. Varian Associates, Inc.*, 114 F.3d 999,  
 23 1001 (9th Cir. 1997)(*internal citations omitted*).

24 Here, two of the four conditions in § 1367(c) are present. This case was removed based  
 25 on 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1367(a) (supplemental  
 26 jurisdiction). Dkt. 1. All Plaintiffs' federal claims are dismissed by this order. Accordingly, the  
 27 Court has "dismissed all claims over which it has original jurisdiction," and so has discretion to  
 28

decline to exercise supplemental jurisdiction over the state law claims under § 1367(c)(3). Moreover, the remaining state claims “raise novel or complex issues of state law” under § 1367(c)(1). For example, in order to determine whether Plaintiffs’ negligence claim based on violation of RCW 82.02.020 (the state statute allowing cities to charge “reasonable fees” for land use application review), the undersigned would have to definitely determine whether LUPA applies - a determination for which the state court is uniquely suited. Moreover, the values of economy, convenience, and comity may well be served by this Court’s declining to exercise supplemental jurisdiction. *See Acri* at 1001. State courts have a strong interest in enforcing their own laws. *See Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 352 (1988).

Although “it is generally within a district court’s discretion either to retain jurisdiction to adjudicate the pendent state claims or to remand them to state court,” *Harrell v. 20th Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991), in the interest of fairness, the parties should be given an opportunity to be heard on whether the case should be remanded. The parties should be allowed to show cause why the remaining state law claims should not be remanded to Pierce County Superior Court. The parties’ responses, if any, should be filed by May 3, 2010. Parties briefs should not exceed four pages. Consideration of the parties’ responses to the Order to Show Cause should be noted for May 3, 2010. To the extent Plaintiffs’ Motion for Partial Summary Judgment (Dkt. 63) deals with state law claims, it should be rescheduled for May 3, 2010. To the extent Defendants Huitt-Zollars and Carl Stixrood’s Motion for Summary Judgment (Dkt. 57) deals with state law claims, it should be rescheduled for May 3, 2010. Defendants Town of Ruston and Michael Transue’s Motion for Summary Judgment Re: State Claims (Dkt. 65) should be rescheduled for May 3, 2010. Defendants Huitt-Zollars and Carl Stixrood’s Joinder in Ruston and Transue’s Motion for Summary Judgment (Dkts. 78 and 79), to the extent these motions apply to state law claims should also be rescheduled for May 3, 2010.

### III. ORDER

Therefore, it is hereby, **ORDERED** that:

- The Clerk is directed to **UNSEAL** the pleading entitled "Exhibit 35 to Declaration of

1       Joan K. Mell" in support of Plaintiffs' Motion for Summary Judgment (Dkt. 76);  
2     • Plaintiffs' Motion to Strike Defendants Huitt-Zollars and Carl Stixrood's Editorial  
3              Exhibits 1 and A-C (Dkt. 106) is **GRANTED**;  
4     • Defendants Town of Ruston and Michael Transue's Motion to Strike (Dkt. 95) is  
5              **GRANTED, IN PART, and DENIED, IN PART**, as stated herein;  
6     • Defendants Town of Ruston and Michael Transue's Motion for Summary Judgment Re:  
7              Federal Claims (Dkt. 64) is **GRANTED**;  
8     • Plaintiffs' federal claims are **DISMISSED**;  
9     • Plaintiffs' Motion for Partial Summary Judgment (Dkt. 63) as it pertains to their federal  
10              claims is **DENIED** and **RENOTED** to May 3, 2010, as it pertains to state law claims;  
11     • Defendants Huitt-Zollars and Carl Stixrood's Motion for Summary Judgment (Dkt. 57) is  
12              **GRANTED** insofar as it applies to Plaintiffs' federal claims, and **RENOTED** to May 3,  
13              2010, as it pertains to state law claims;  
14     • Defendants Town of Ruston and Michael Transue's Motion for Summary Judgment Re:  
15              State Claims (Dkt. 65) is **RENOTED** to May 3, 2010;  
16     • Defendants Huitt-Zollars and Carl Stixrood's Joinder in Ruston and Transue's Motion for  
17              Summary Judgment (Dkts. 78 and 79) is **GRANTED** as to Plaintiffs' federal claims and  
18              **RENOTED** to May 3, 2010, as to state law claims  
19     • Parties may show cause, if any they have, why this matter should not be remanded to  
20              Pierce County, Washington Superior Court. Responses, if any, should be filed by May  
21              3, 2010, and should not exceed four pages in length.

22              The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel  
23              of record and to any party appearing *pro se* at said party's last known address.

24              DATED this 28<sup>th</sup> day of April, 2010.

25                
26              Robert J. Bryan  
27              United States District Judge